No. 17-1660	
Title:	**City of Escondido, California, et al., Petitioners** **v.** **Marty Emmons**
Docketed:	June 12, 2018
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Numbers:	(16-55771)
Decision Date:	March 29, 2018

DATE	PROCEEDINGS AND ORDERS
Jun 08 2018	Petition for a writ of certiorari filed. (Response due July 12, 2018) **Petition** **Appendix** **Proof of Service** **Certificate of Word Count**
Jul 11 2018	Waiver of right of respondent Marty Emmons to respond filed. **Main Document**
Jul 18 2018	DISTRIBUTED for Conference of 9/24/2018.
Jul 25 2018	Response Requested. (Due August 24, 2018)
Aug 20 2018	Motion to extend the time to file a response from August 24, 2018 to September 24, 2018, submitted to The Clerk. **Main Document**
Aug 28 2018	Motion to extend the time to file a response is granted and the time is extended to and including September 24, 2018.
Sep 24 2018	Brief of respondent Marty Emmons in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 10 2018	DISTRIBUTED for Conference of 10/26/2018.
Oct 29 2018	DISTRIBUTED for Conference of 11/2/2018.
Oct 31 2018	Record Requested.
Nov 02 2018	Record received from U.S.C.A. for the Ninth Circuit (one envelope). The remaining record is electronic and available on PACER.
Nov 05 2018	DISTRIBUTED for Conference of 11/9/2018.

Nov 13 2018	DISTRIBUTED for Conference of 11/16/2018.
Nov 26 2018	DISTRIBUTED for Conference of 11/30/2018.
Dec 03 2018	DISTRIBUTED for Conference of 12/7/2018.
Dec 20 2018	DISTRIBUTED for Conference of 1/4/2019.
Jan 07 2019	The petition for certiorari is granted, the judgment of the Court of Appeals is reversed in part and vacated in part, and the case is remanded for further proceedings consistent with this **opinion**. **Opinion**per curiam. (Detached **Opinion**)

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Party name: Marty Emmons		

No.

IN THE

Supreme Court of The United States

CITY OF ESCONDIDO, SGT. KEVIN TOTH, AND EPD OFFICER ROBERT CRAIG,

PETITIONERS,

V.

MARTY EMMONS,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Escondido Police Officers responding to a 9-1-1 domestic violence call at a residence encountered a large unknown man, Respondent Marty Emmons, hastily exiting the subject apartment, disobeying the officer's commands not to close the door so officers could gain entry to conduct a lawful welfare check on the occupants. The fast-moving encounter between Officer Robert Craig and Emmons, captured on the officer's body camera, reflects a limited use of force to detain him under the circumstances. As Emmons cited *no* legal authorities for the proposition that the nature of the force was excessive and therefore unconstitutional, the District Court granted summary judgment to all officers under the second prong of the qualified immunity standard under *Saucier v. Katz*, 533 U.S. 194 (2001).

The Ninth Circuit Court of Appeal reversed that decision citing a single case, decided after the event giving rise to this lawsuit, observing, simply and without elaboration that, "[t]he right to be free of excessive force was clearly established at the time of the events in question" and finding qualified immunity was unavailable. The panel below explicitly barred the officers from seeking any further review by the circuit.

1. Did the Ninth Circuit err in denying the officers qualified immunity by considering clearly established law at too high a level of generality rather than giving particularized consideration to the facts and circumstances of this case?

2. Did the Ninth Circuit err in denying the officers qualified immunity by relying on a single decision, published after the event in question, to support its conclusion that qualified immunity is not available?

3. Did the Ninth Circuit err in failing or refusing to decide whether the subject arrest was without probable cause or subject to qualified immunity?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Ninth Circuit, whose judgments are sought to be reviewed, are Petitioners, and Defendants below, the City of Escondido, a municipal corporation in the State of California, Escondido Police Sergeant Kevin Toth, and Escondido Police Officer Robert Craig.

Respondent, and Plaintiff below, is Marty Emmons.

Maggie Emmons, Plaintiff below, is not a party to this Petition.

Escondido Police Chief Craig Carter, former Acting Escondido Police Chief Corey Moles, and Officers Huy Quach, Jake Houchin and Joseph Leffingwell, Defendants below, are not parties to this Petition.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

All parties before the Court are individuals except the City of Escondido, which is a general law city in the State of California.

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PETITION FOR WRIT OF CERTIORARI

Petitioners City of Escondido, Police Officer Robert Craig and Sergeant Kevin Toth respectfully petition for a writ of certiorari to review the unpublished Amended Memorandum decision and judgment of the United States Court of Appeals for the Ninth Circuit in this case. The Ninth Circuit announced its original decision on February 22, 2018, and later amended its opinion on March 29, 2018. The panel ordered that no further petitions for rehearing or rehearing en banc be filed.

OPINIONS BELOW

The Ninth Circuit panel's Amended Memorandum opinion was not published but is available at 716 F.App'x 724 (9th Cir. 2018). (Appendix A.)

The Ninth Circuit panel's Order granting petition for panel rehearing and barring any further petitions for panel rehearing or rehearing *en banc* was not published. (Appendix E.)

The Ninth Circuit panel's original Memorandum opinion was not reported. (Appendix B.)

The Order of the United States District Court Granting Petitioners' Motion for Reconsideration pursuant to Fed.R.Civ.P. 60(b) is available at 2016 WL 10586164. (Appendix C.)

The Order of the United States District Court for the Southern District of California granting

Defendants' motion for summary judgment and granting qualified immunity to Petitioners filed by Defendants City of Escondido, Chief of Police Craig Carter, former Acting Chief of Police Corey Moles, Sgt. Kevin Toth, Officers Robert Craig, Jake Houchin and Joseph Leffingwell was not published. It is available at 168 F.Supp.3d 1265 (S.D. Cal. 2016). (Appendix D.)

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its original opinion on February 22, 2018. (App. 5-8.) It amended its opinion and denied the Petitioners any ability to further petition for rehearing or reconsideration for an *en banc* rehearing on March 29, 2018. (App. 36-37.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Mr. Emmons alleges that Officer Craig and Sgt. Toth violated his civil rights under the Fourth Amendment to the United States Constitution, which states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Mr. Emmons brought the underlying action under 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

INTRODUCTION

The state of the law in the Ninth Circuit puts police officers in the impossible position of enforcing the laws without knowing whether their particular conduct is constitutional. Indeed, this Circuit has been repeatedly admonished to respect the concept of qualified immunity. Yet, again, it ignores the clear direction of this Court making this Petition necessary.

A police officer is entitled to qualified immunity so long as his or her conduct is within a "reasonable range" of conduct. "In all, police officers are not required to use the least intrusive degree of force possible; they are required only to act within a reasonable range of conduct." *Forrester v. City of San Diego*, 25 F.3d 804, 806 (9th Cir. 1994). The decision below fails to identify the clearly established case law governing the circumstances of the subject encounter, relies on a single case decided after the event, and fails to address the question of probable cause to arrest raised at the trial and circuit court levels.

The District Court ruled that Mr. Emmons failed to cite to any authority that the officers had notice that taking him to the ground or placing a hand on him was unconstitutional. The courts reviewing the officers' videotape of the incident cannot agree whether Mr. Emmons' rights were clearly established. Yet, the Ninth Circuit panel's opinion concludes every reasonable police officer would immediately know, under the very circumstances presented here, that such conduct would constitute a clear violation of Mr. Emmons' constitutional rights.

The correct question in a qualified immunity context is to determine whether the law under the facts particular to the case were clearly established such that a reasonable officer would know that his or her conduct was unlawful. In this matter, the panel made no effort to harmonize or compare the underlying circumstances of this event with the facts of *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013) ("*Gravelet-Blondin*"), the sole case the

panel cites. The panel did not do so because the facts are not comparable.

In this matter, during an intense standoff with the occupant of a residence during a domestic violence welfare check, an unknown man surprised the officers by exiting unannounced. Officer Craig guided Mr. Emmons to the ground when he failed to obey the officer's commands not to close the apartment door and tried to push his way past him. Officer Craig did so without any violence or unnecessary roughness. While Mr. Emmons was on the ground, Sgt. Toth simply and briefly placed a hand on him producing no claimed injury or pain. In *Gravelet-Blondin*, the case relied upon by the Circuit panel, officers tased a bystander who was not advancing or threatening officers. *Gravelet-Blondin*, *supra*, 728 F.3d at 1089-90. The disparity of the facts and circumstances between these events are obvious and material.

This Court has repeatedly instructed the Circuit Courts, and particularly the Ninth Circuit, to avoid defining clearly established law at a high level of generality. Again, in the context of an excessive force and qualified immunity case, the Ninth Circuit panel below has defined clearly established law at such a high level of generality, that the single case relied upon by the panel below can also be interpreted to *support* the officers' use of force. The panel below relied solely upon *Gravelet-Blondin* for the proposition that "[t]he right to be free of excessive force was clearly established at the time of the events in question."[1] However, using the same level of

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[1] Although the Panel states that "The right to be free of

generality as the panel below, this very case could be interpreted to establish that a police officer *may* use force to arrest a passive resister.[2] The *Gravelet-Blondin* court noted: "While purely passive resistance can support the use of some force, the level of force an individual's resistance will support is dependent on the factual circumstances underlying that resistance." *Gravelet-Blondin, supra*, at p. 1091, citing *Bryan v. MacPherson*, 630 F.3d 805, 830 (9th Cir. 2010).

Thus, the determination of whether the sole case relied upon by the circuit panel clearly establishes Mr. Emmons' right against excessive force depends upon the panel's interpretation of a case instead of the required analysis of *the officer's particular conduct* during the incident. Proper qualified immunity analysis cannot be so limited. Simply put, there is precedent governing the circumstances akin to the incident or there is not.

Apart from a failure to review the specific circumstances of the officers' conduct for an analysis of the applicability of qualified immunity of the excessive force allegation, the Circuit panel erred by

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excessive force was clearly established *at the time of the events in question*," *Gravalet-Blondin* was not decided until September 6, 2013, four months *after* the incident in this case.

[2] Mr. Emmons was not a "passive resister." Unlike Mr. Blondin who was not moving when tased, Mr. Emmons was using his body to push his way past Officer Craig, intentionally blocking Officer Craig from getting into the apartment to check the welfare of the occupants. App. 21-22, 33-34.

completely failing to address the District Court's ruling that Officer Craig had qualified immunity as to Mr. Emmons' false arrest allegation.

The Court should grant the Petition on all three questions presented, or, alternatively, summarily reverse the Ninth Circuit's decision. Clear guidance from the courts on the contours of the Fourth Amendment and qualified immunity is necessary.

STATEMENT OF THE CASE

I. Facts

A. Prior Incidence of Domestic Violence at Apartment

One month prior to the incident which gives rise to this lawsuit, in April 2013, Escondido police officers responded to a 9-1-1 call initiated by Maggie Emmons where she reported that her husband, Brandon, had used force upon her causing her injuries. ER 346-48, 528-29. Officer Jake Houchin, among other officers, responded to the apartment pursuant to the dispatch. He was involved in taking the domestic violence report, including a report that her husband had also injured her a week before; he took photographs of her injuries; and according to Ms. Emmons, he was a "nice" officer during the event. ER 349-354. Brandon was a large person at about 6'2" and 280 lbs. ER 355, 397-98.

B. Officers Respond to Dispatch for 9-1-1 Call Relating to Screams for Help at Apartment Containing Children

On May 27, 2013, at approximately 2:30 p.m., Escondido Police Dispatch received a 9-1-1 call from Trina Douglas, the mother of Ametria Douglas ("Ametria"), Ms. Emmons' roommate. ER 322 Audio A; ER 324-26. Ms. Douglas reported that she lived in Los Angeles and was on a telephone call with Ametria and that as she was speaking with her, the daughter's roommate (Ms. Emmons) started a fight, there was screaming and that the daughter screamed for help before the telephone line went dead. Ms. Douglas also reported that there were two children in the home and that she tried to call the number back but there was no answer. ER 325-26.

At approximately 2:40 p.m., Officers Houchin and (Petitioner) Robert Craig were dispatched to Ms. Emmons' apartment (a second floor unit) as a result. ER 390-91, 394, 468, 470. They received from dispatch the following information via their patrol unit computer:

> WC on RP's 24 yo daughter Ametria Douglas. RP was speaking to daughter on phone. Daughter's female roommate came home, started some kind of 415. Was screaming and jumping to Ametria. Ametria screamed into phone for her mother to help, then phone disconnect. No answer on call back. Two children also in resd.

ER 322 Audio B; ER 329, 390-91, 421, 470.

A "415" is a common abbreviation for California Penal Code § 415 and used over police dispatch to cover diverse events such as fights, arguing, and other disturbances. ER 471-73. Officer Craig viewed this as an emergency situation. ER 474, 504-05; SUPP ER-007-008 (children shouting "don't take my mom to jail" led him to believe that there was some sort of emergency); SUPP ER-009-010; SUPP ER-011-012; SUPP ER-013.

Not knowing everything about the incident prior to their arrival, the officers were concerned about all potential occupants of the apartment, not just the reporting party's daughter. ER 417, 477, 498. The officers arrived at approximately the same time and walked to the apartment at the same time. ER 395, 475-76. The officers activated their body video cameras shortly after their arrival at the apartment. ER 392-93, 466-67.

The officers proceeded to the apartment together to investigate the call as a welfare check. ER 397,486, 487, 493-94. Dressed in police uniforms, Officer Craig knocked on the door while Officer Houchin contacted Ms. Emmons at a side window adjacent to an external walkway. ER 274 Craig A at 0:00-0:10. Both Ms. Emmons and Mr. Emmons immediately knew they were Escondido police officers. ER 358-59, 430-31. On and off over the next 7 minutes Officers Houchin and Craig alternatively spoke with Ms. Emmons at the side window. ER 274 Craig A at 0:00-6:30; ER 277-83. Ms. Emmons appeared at the side window through a small opening surrounded by vertical blinds making the interior of the apartment dark and the officers could not see into

the interior of the apartment. ER 274 Craig A at 4:45-6:30; ER 534, 400, 407-08, 432-33, 534. Officer Craig perceived her demeanor as not calm but evasive. ER 490-91.

Within approximately one and one-half minutes upon arrival, a request was made to police dispatch for additional officers to provide assistance should there be a need for forced entry. ER 322 Audio C; ER 332, 399, 410-11, 495-96. There had in fact been screaming coming from inside the apartment earlier, although it was not related to a movie on the television as suggested by Ms. Emmons. AOB 5. Within approximately 6 minutes of the discussion at the window, Ms. Emmons admitted to Officer Craig that her children had been screaming in the apartment when she threatened to hit them. ER 274 Craig A at 5:10-5:20; ER 281. The officers made continued efforts through the side window to have Ms. Emmons allow entry so that a welfare check could be conducted in the apartment. The response of Ms. Emmons was making Officer Craig more concerned as to the safety of the occupants and he believed the call was becoming more dangerous. ER 497.

While the officers were talking to Ms. Emmons, Ametria was at the ground floor pool with Ms. Emmons' boys around the time they arrived. Ametria has testified that she did not know her mother had called the police when the officers were there. ER 526-27. Nevertheless, right after the officers arrived, Ametria told them everything was fine and they could leave. ER 483-84, 523, 525. Based on Officer Craig's experience, her manner of reporting

the situation was a "red flag" and her demeanor was inconsistent with there being no problem at the apartment. ER 484-85, 487.

Even though Ametria represented herself as being connected to the apartment, the officers had not confirmed her identity until later and they did not know who the boys were at that time. ER 274 Houchin D at 0:30-2:00; ER 274 Houchin 1E at 4:55-8:25; ER 306-08, 309, 317-19, 401-04, 407, 437, 478-81, 482, 524. The welfare check dispatch made no reference to a woman at the pool of the apartment complex. ER 329, 405-06. The officers asked her to come up and let them into the apartment or talk to Ms. Emmons. ER 274 Craig A at 2:57-3:07, 3:50-4:00; ER 274 Houchin C at 3:15-3:35; ER 280, 303, 488. From the window, Ms. Emmons told Ametria not to talk to the police officers. ER 274 Craig A at 4:30-4:40; ER 280, 515-16. Ametria never advised the officers that the boys at the pool were Ms. Emmons' or that they lived at the subject apartment. ER 478-79, 524. Ametria stayed at the pool area the entire time and never came upstairs to assist, intervene or speak with Ms. Emmons. ER 530. Further, she never provided any information to the officers about why anyone would have called and reported that she needed help. She did however confirm that there was screaming inside the apartment prompting the call for police intervention. ER 284.

As she had done with Officer Houchin, Ms. Emmons interrupted and talked over Officer Craig's efforts to explain the reason for their presence. ER 274 Craig A at 0:00-0:40, 5:04-5:30; ER 281. Ms. Emmons refused to allow Officers Craig and

Houchin entry demanding instead that they produce a warrant. The officers repeatedly explained to her that they believed they were performing a welfare check and they had exigent circumstances to enter for the safety of the occupants. ER 274 Craig A; ER 277-282. At one point, as Officer Craig was talking to Ms. Emmons at the window, an unknown and unseen male inside the apartment told Ms. Emmons to come away from the window. ER 274 Craig A at 6:20-6:28; ER 283, 434-35, 449-50, 489, 492, 505. Although it was actually Mr. Emmons, he never came to the window to present or identify himself and the officers did not know who that person was as neither Ms. Emmons nor Ametria ever advised the officers who was in there. ER 274 Craig A at 6:15-6:30 (Male voice heard telling Maggie to come away from the window); ER 376, 408, 409, 434-35. Officer Craig asked who the person was, and Mr. Emmons did not respond or come to the window. ER 283. The dispatch for the welfare check did not report the presence of a male in the apartment. ER 329.

C. Brief, Selective and Reasonable Force Used on Mr. Emmons as He Exits Unannounced from Apartment

Within approximately 9-10 minutes of Officers Craig's and Houchin's arrival, Mr. Emmons opened the front door without announcing he was coming out. He stepped onto the landing pushing past and coming in contact with Officer Craig while the officer ordered him not to close the door. ER 274 Craig A at 9:34-9:50; ER 362, 363, 436, 440, 441-42, 454, 455, 498-99, 500-02, 511-13. Mr. Emmons knew the officers wanted to access the apartment and yet intentionally

shut the door behind him to "protect" his daughter. ER 274 Houchin E at 0:45-0:55; ER 288-89, 316, 362, 363, 436, 440, 441-42, 454, 455, 498-99, 500-502, 511-13.

Officer Craig grabbed hold of Mr. Emmons by his arm, told him to get on the ground several times, guided him to the ground in a control hold, placed him prone on the ground, and then handcuffed him. ER 274 Craig A, at 9:34-10:00; ER 500-01, 503. The full extent of Mr. Emmons' description of the force was that he was "forcibly thrown to the ground." ER 124. At that time, Officer Craig believed it was a fast moving event and it was necessary to control Mr. Emmons on the ground because the officer was alone, did not know what was happening in the apartment, Mr. Emmons had tried to physically push past him, and refused to obey his order not to close the door. ER 274 Craig A at 9:34-9:50; ER 503-05. At this time, Officer Craig also had information about the prior domestic violence at the apartment and did not know who Mr. Emmons was when he came out unannounced. ER 505-06. Mr. Emmons was arrested for a violation of Penal Code § 148 by Officer Craig. ER 414, 508, 509, 511-12, 583-84. Penal Code § 148 is a misdemeanor offense prohibiting the willful delaying, resisting or obstructing of a peace officer in the discharge or attempted discharge of his or her duties. Cal. Penal Code § 148(a)(1).

Within 2 minutes of securing Mr. Emmons on the ground, Officer Craig assisted him in getting up in the manner requested by Mr. Emmons, and then stood him against an adjacent exterior wall on the landing a few feet away. ER 274 Craig A at 9:48-

11:50; ER 507. Other than the brief touching of Mr. Emmons' shoulder by Sgt. Toth, no officer other than Officer Craig touched him. ER 414, 447-48, 542, 583, 584. No other officer observed the beginning of the contact between Officer Craig and Mr. Emmons. ER 413, 541, 558-59.

At no time did Officer Craig or any other officer at the scene display or use any weapon on Mr. Emmons, or use a chemical agent, punch, elbow, kick, knee, choke hold, or threaten him with any other form of force during the entire time the officers were there at the scene. ER 442-43, 444, 447-48, 451. Instead, Sgt. Toth made efforts to make Mr. Emmons comfortable during the investigation by asking if he wanted a chair to sit on while the officers were there. Mr. Emmons refused that offer. ER 274 Houchin E at 0:00-0:38; ER 315, 445-46.

Soon after Sgt. Toth had arrived, Officer Houchin, debriefed him as to the status of the incident however, at that time, there was still confusion as to what was happening inside the apartment, who Mr. Emmons was, and who the woman by the pool was. ER 274 Houchin D at 0:30-2:00; ER 306-08, 412.

D. Officer Leffingwell Enters Apartment With Ms. Emmons' Consent to Conduct Brief and Limited Search

While Mr. Emmons was being taken into custody and began speaking with Sgt. Toth outside of the apartment, at the side window along the landing, Officer Joseph Leffingwell, who just arrived on scene, spoke with Ms. Emmons through the window. ER

364, 379-80, 560-61. Officer Leffingwell is a specially trained Psychological Emergency Response Team (PERT) officer with experience dealing with serious emotional issues (*e.g.*, active suicide attempts) and de-escalation techniques. ER 554, 555-57. At first, Officer Leffingwell observed Ms. Emmons at the window between the blinds and the interior of the apartment was dark. ER 565. Officer Leffingwell believed, based on the information he had at that time, including the commotion by the door where Mr. Emmons was being taken into custody, entry into the apartment to check on the occupants was necessary under the totality of circumstances. ER 566-67, 573.

Ms. Emmons consented to allow entry into the apartment. ER 364, 379-80, 568, 569-70, 571, 572-73. At that time, Officer Leffingwell did not witness, had no knowledge of, and was not involved with the other officers' previous efforts to get into the apartment. ER 562-63, 570. Ms. Emmons moved from the window, unlocked the door, opened it, and then said to Officer Leffingwell "you can walk anywhere you want to walk." ER 274 Houchin D at 2:00-2:05; ER 576. Sgt. Toth was not involved in the decision to enter and/or search Ms. Emmons' apartment. ER 543.

The officers never lied or used any trick or misrepresentation to gain access to the apartment. ER 374-75. No officer ever pointed or displayed a weapon at Ms. Emmons, threatened to use violence upon her personally, or touched her in anyway at any time. ER 360-61, 377, 451. No equipment or weapons were ever used to break down the door or gain access

through any opening into the apartment at any time during the event. ER 364-65, 374, 438-39, 451, 452.

Officer Leffingwell made a cursory inspection of the apartment lasting approximately one minute looking only for potential injured persons. ER 368, 577-78, 580-82. Once inside, Ms. Emmons never stated that she changed her mind about the police entry, stated that she felt compelled to allow entry, demanded that any officer leave, or objectively demonstrated any reconsideration of her decision to allow entry. ER 274 Houchin D at 2:00-6:45; ER 365-66, 366-67, 370-71. Once the cursory sweep for potentially injured occupants was completed, Officers Leffingwell and Houchin explained to Ms. Emmons why they were there and why they needed to enter the apartment. ER 274 Houchin D, at 2:00-6:45; ER 309-12, 572-73. Ms. Emmons was never touched, searched, detained or arrested by any officer. ER 377, 415-16, 514, 579.

II. Proceedings

A. District Court

1. The Underlying Action

Mr. Emmons and his daughter sued the City of Escondido, the current Chief of Police, Craig Carter, the former Acting Chief of Police, Corey Moles, and all the officers involved including Sgt. Kevin Toth, Officers Robert Craig, Huy Quach, Jake Houchin, and Joseph Leffingwell ("officers"). (App. 9-10, 12-15.) The parties stipulated to dismissing Officer Huy

Quach because he arrived after Mr. Emmons' arrest. (App. 10.)

The Emmonses asserted claims for relief in their First Amended Complaint as follows:

1. Unlawful Seizure, Arrest and Detention against all officers;

2. Excessive force against all officers;

3. Unreasonable Search without a Warrant against all officers;

4. *Monell* violations against the City of Escondido, former Acting Chief of Police Corey Moles and Chief of Police Craig Carter;

5. Failure to Properly Train against the City of Escondido, former Acting Chief of Police Corey Moles, Chief of Police Craig Carter, and Sgt. Kevin Toth;

6. Failure to Supervise and Discipline against the City of Escondido, former Acting Chief of Police Corey Moles and Chief of Police Craig Carter;

7. Violations for the *Bane Act*, California Civil Code §§ 52.1 and 52.3 against all named Defendants in the lawsuit.

(App. 12-13.)

2. The Parties Stipulated to Bifurcate the *Monell* Claims and Dismissed the *Bane Act* Claims

The parties jointly bifurcated the case to separate the *Monell* claims. The parties further agreed that should the court rule in the summary judgment cross motions that none of the police officers violated both of Mr. and Ms. Emmons' federal civil rights, or they all have qualified immunity from any liability to the Emmonses, neither of the them would have a viable federal civil rights claim based on the facts alleged by them in this case, including the *Monell* claims, against the City, Chief of Police Craig Carter, and (former) Acting Chief of Police Corey Moles. Defendants'-Appellees' Opening Brief at 13.

In light of the Stipulation, the City's Motion for Summary Adjudication did not seek a judgment as to the Fourth, Fifth and Sixth Causes of Action, or any other claims that existed elsewhere in the Complaint, as it relates to the *Monell* claims. Therefore, the City, (former) Acting Chief Corey Moles and Chief Carter sought judgment in their favor solely on the grounds that the police officers did not violate Mr. and Ms. Emmons' federal civil rights during the course of the subject incident.

Mr. and Ms. Emmons dismissed their Seventh Cause of Action for Violations of the Bane Act against all named Defendants as a result of an earlier District Court Order Denying Motion for Relief from Claims Filing Requirement, etc., filed October 17, 2014.

3. The District Court Granted the Officers' Motion for Partial Summary Judgment and Denied the Emmonses' Motion

The Parties filed cross Motions for Partial Summary Judgment. On March 2, 2016, the District Court denied Mr. and Ms. Emmons' motion and granted the motion brought on behalf of the City, all officers and the two police chiefs. (App. 12-35.)

The District Court concluded that there were issues of fact whether Officer Craig used excessive force, but granted all of the police officers, including Officer Craig, qualified immunity under the second prong of the two-step analysis approved in *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Specifically, the District Court noted that there is no authority clearly establishing Officer Craig's "tackle or take-down" of Mr. Emmons violated the Fourth Amendment and he failed to cite to any such authority. Therefore, the officers were not provided with "fair warning that their conduct was unlawful:"

The District Court further found that "the objective evidence revealed the officers had probable cause – based on the totality of the circumstances – to believe that Mr. Emmons violated Penal Code §148(a)" and that the officers were entitled to qualified immunity on the false arrest claim. (App. 26-28.)

B. Ninth Circuit Court of Appeals

1. Original Opinion

On February 22, 2018, the Ninth Circuit panel correctly affirmed the District Court's judgment as to Maggie Emmons' Fourth Amendment claims finding that the "officers had an objectively reasonable basis to conclude that there was a need to conduct a welfare check" inside the apartment. (App. 6-7.) However, the panel reversed the District Court's summary judgment as to Mr. Emmons' excessive force claim. (App. 7-8.) The panel's entire opinion overturning the District Court's granting of qualified immunity to Mr. Emmons' excessive force claim is as follows:

> As to Mr. Emmons, there is a genuine issue of material fact as to whether separating him from the house was accomplished with excessive force. We consider the following factors in determining if the use of force is excessive: "(1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Estate of Lopez ex rel. Lopez v. Gelhaus*, 871 F.3d 998, 1005 (9th Cir. 2017) (alteration in original) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)) (internal quotation marks omitted). There is evidence from which a reasonable trier of fact could find that Mr. Emmons was unarmed and non-hostile. The district court therefore

> erred in granting qualified immunity on his excessive force claim.

(App. 7-8.)

The opinion does not address the District Court's finding of qualified immunity as to Mr. Emmons' false arrest allegation, an issue raised in his briefing. Plaintiffs'-Appellants' Opening Brief (AOB) at 40-42. No disposition was made as to Chiefs Carter and Moles.

2. Amended Opinion and Denial of Further Rehearing

On March 7, 2018, all officers/Defendants in the action filed a Petition for Panel Rehearing as to the following four issues:

1. Whether Officers Houchin, Leffingwell, Sgt. Toth, Chief Carter and former Chief Moles are dismissed from the action, and in particular, in relation to Mr. Emmons' excessive force claim;

2. If they are not dismissed, whether they are entitled to qualified immunity;

3. Whether Officer Craig is entitled to qualified immunity; and

4. Whether Chief Carter and former Chief Moles should be dismissed as redundant Defendants.

On March 29, 2018, the Ninth Circuit issued an Amended Memorandum now reinstating qualified immunity for Officers Leffingwell and Houchin and finding summary judgment appropriate for all other Defendants except Craig and Toth. (App. 3-4.) The entirety of the panel's amended opinion as to the specific applicability of qualified immunity to Mr. Emmons' excessive force claim is as follows:

> The right to be free of excessive force was clearly established at the time of the events in question. *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013).

(App. 36-37.)

Again, no disposition was made as to the false arrest claim.

The Ninth Circuit panel issued an order in its Amended Memorandum barring any further petitions for panel rehearing or rehearing en banc. (App. 37.)

REASONS FOR GRANTING THE WRIT

I. The Panel Opinion Improperly Denies Qualified Immunity by Assessing the Officers' Conduct at a Highly Generalized Level

The Ninth Circuit's panel opinion fails to heed numerous admonitions from this Court about defining "clearly established" constitutional rights too generally. This Court's repeated findings of qualified immunity emphasize the narrow circumstances in which government officials may be held personally

liable for their actions in suits for money damages. *See, Kisela v. Hughes, supra,* 138 S.Ct. 1148, 1152-53; *District of Columbia v. Wesby,* __ U.S. ___, 138 S.Ct. 577, 589-91 (2018) ("*Wesby*"); *Ziglar v. Abbasi,* __ U.S. ___, 137 S.Ct. 1843, 1866-67 (2017); *White v. Pauly,* __ U.S. ___, 137 S.Ct. 548, 551-52 (2017); *Mullenix v. Luna,* __ U.S. ___, 136 S.Ct. 305, 308-09 (2015) ("*Mullenix*"); *Taylor v. Barkes,* 135 S.Ct. 2042, 2044 (2015); *Carroll v. Carman,* 135 S.Ct. 348, 350-52 (2014) (*per curiam*); *Lane v. Franks,* 134 S.Ct. 2369, 2383 (2014); *Wood v. Moss,* 134 S.Ct. 2056, 2070 (2014); *Plumhoff v. Rickard,* 134 S.Ct. 2012, 2023-24 (2014); *Stanton v. Sims,* 134 S.Ct. 3, 7 (2013).

This Court has repeatedly warned the lower courts not to analyze clearly established law at too high a level of generality. *Mullenix, supra,* 136 S.Ct. at 311; *City and Cnty. of San Francisco v. Sheehan,* 135 S.Ct. 1765, 1775-76 (2015). In all section 1983 cases, courts must undertake the qualified immunity analysis "in light of the specific context of the case, not as a broad general proposition." *Mullenix, supra,* 136 S.Ct. at 308 (quoting *Brosseau v. Haugen,* 543 U.S. 194, 198 (2004) (*per curiam*). Put another way, the court must enunciate "a concrete, particularized description of the right." *Hagans v. Franklin Cnty. Sheriff's Office,* 695 F.3d 505, 508 (6th Cir. 2012); *Spady v. Bethlehem Area Sch. Distr.,* 800 F.3d 633, 638 (3d Cir. 2015) (the right at issue must be framed "in a more particularized, and hence more relevant, sense, in light of the case's specific context").

This Court's precedent has generally clarified the qualified immunity defense, beginning with

Ashcroft v. al-Kidd, 563 U.S. 731 (2011) where this Court reformulated the qualified immunity standard to require "*every* 'reasonable official . . . [to] understand that what he is doing violates that right.' " *Id.* at 741, quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (emphasis added). Qualified immunity now protects "all but the plainly incompetent or those who knowingly violate the law." *Mullenix*, *supra*, 136 S.Ct. at 308. This Court's repeated recitation of the standard in *Mullenix* has signaled that *Mullenix* should be applied broadly to section 1983 claims made against police officers.

An officer enjoys qualified immunity and is not liable for excessive force unless he has violated a "clearly established" right, such that "it would [have been] clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2474 (2015) (quoting *Saucier v. Katz*, *supra*, 533 U.S. at 202). The immunity inquiry acknowledges that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here the use of reasonable force to effect an arrest, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, the officer is entitled to the immunity defense. *Ashcroft v. Al-Kidd*, *supra*, 563 U.S. at 743.

The plaintiff's burden to rebut a showing of qualified immunity is a demanding standard. *See Kingsley*, 135 S.Ct. at 2474-75; *Vincent v. City of Sulphur*, 805 F.3d 543, 547 (5th Cir. 2015). This burden can only be met by assessing the specific evidence and context of the case, and not by taking refuge in lofty principles wholly divorced from the realities actually confronted by police officers. The requirement that the law be clearly established is designed to ensure that officers have fair notice of what conduct is proscribed. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

The correct inquiry is "whether the violative nature of *particular conduct* is clearly established" (emphasis supplied). *Ashcroft v. al-Kidd, supra*, 563 U.S. at 742. "[E]xisting precedent must have placed the statutory or constitutional question *beyond debate*" (emphasis supplied). *Id.* at 741; *see also, Mullenix, supra*, 136 S.Ct. at 308; *Stanton, supra*, 134 S.Ct. at 5. To find the existence of a clearly established right, the court must "conclude that the firmly settled state of the law, established by a forceful body of persuasive precedent, would place a reasonable official on notice that his actions obviously violated a clearly established constitutional right." *Spady v. Bethlehem Area Sch. Dist., supra*, 800 F.3d at 639.

In the present case, the Ninth Circuit panel once again ignored this Court's admonishments by falling back on general principles and holding that: "The right to be free of excessive force was clearly established at the time of the events in question.

Gravelet-Blondin v. Shelton, *supra*, 728 F.3d at 1093 (9th Cir. 2013)."[3] (App. 4, 37.)

While *Gravelet-Blondin* did not require a case directly on point, it still acknowledged that in order for a right to be clearly established, the existing precedent must have placed the right "beyond debate." *Gravelet-Blondin, supra*, 728 F.3d at 1093, citing to *Ashcroft v. al–Kidd, supra*, 563 U.S. at 741.

Just a month before the Ninth Circuit overturned qualified immunity for Officer Craig and Sgt. Toth, this Court decided *Wesby*. In *Wesby*, this Court articulated the stringent requirement for a precedent to be clearly established:

> To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be "settled law," [Citations omitted] which means it is dictated by "controlling authority" or "a robust 'consensus of cases of persuasive

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[3] By contrast, other Circuits have become far more precise in their definition of clearly established rights at issue in particular cases. *See, e.g., Estate of Armstrong v. Village of Pinehurst*, 810 F.3d 892, 907-08 (4th Cir. 2016) ("[t]he constitutional right in question in the present case, defined with regard for Appellees' particular violative conduct, is Armstrong's right not to be subjected to tasing while offering stationary and non-violent resistance to a lawful seizure") citing *Hagans v. Franklin Cnty. Sheriff's Office, supra*, 695 F.3d at 509 ("[d]efined at the appropriate level of generality - a reasonably particularized one - the question at hand is whether it was clearly established in May 2007 that using a taser repeatedly on a suspect actively resisting arrest and refusing to be handcuffed amounted to excessive force").

> authority,' . . . ." It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. Otherwise, the rule is not one that "every reasonable official" would know.
>
> The "clearly established" standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is "clear to a reasonable officer that his conduct was unlawful in the situation he confronted."

Wesby, 138 S.Ct. at 589–90.

Most recently, in *Kisela*, this Court went to great lengths to reiterate the importance of qualified immunity for police officers in an excessive force context and identify what is required to deny a police officer the protection of qualified immunity.

> "[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." Use of excessive force is an area of the law "in which the result depends very much on the facts of each case," and thus police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific

> facts at issue. Precedent involving similar facts can help move a case beyond the otherwise "hazy border between excessive and acceptable force" and thereby provide an officer notice that a specific use of force is unlawful.
>
> ...
>
> Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." That is a necessary part of the qualified-immunity standard, and it is a part of the standard that the Court of Appeals here failed to implement in a correct way.

Kisela, supra, at 138 S.Ct. at 1152-53 (internal citations omitted).

In this case, the Ninth Circuit defined the right at issue as simply the Fourth Amendment right to be free from the excessive use of force absent a threat or danger. This formulation lacks the required level of specificity and does not address the question that needs to be answered in this specific context. Indeed,

a prior Ninth Circuit panel criticized this type of generic formulation of the law, noting that "The standards from *Garner* and *Graham* 'are cast at a high level of generality,' so they ordinarily do not clearly establish rights. *[Citation omitted.]* Rather, it is the facts of particular cases that clearly establish what the law is." *Isayeva v. Sacramento Sheriff's Dep't*, 872 F.3d 938, 951 (9th Cir. 2017), citing *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004).

When the Ninth Circuit tried to compare dissimilar facts in *Kisela* in order to make a high level of generality definition of a clearly established right, this Court took note. In *Kisela*, the Ninth Circuit compared Kisela's conduct to the officers' conduct in *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997). In *Harris*, the Court of Appeals determined that an FBI sniper, who was positioned safely on a hilltop, used excessive force when he shot a man in the back while the man was retreating to a cabin during the Ruby Ridge standoff. In *Kisela*, Officer Kisela shot and killed a woman with a knife who had a history of mental illness and had earlier been hacking a tree with a knife. Kisela shot the knife-wielding woman through a chain link fence because he perceived her as a threat when she approached her roommate, carrying the knife, and was only six feet from her roommate. This Court in *Kisela* found that "[t]he panel's reliance on *Harris* does not pass the straight-face test." *Kisela, supra*, 138 S.Ct. at 1154.

It appears that the current state of the law for law enforcement in California is that an officer's individual liability hinges on an arbitrary choice among various general propositions . . . and

unfortunately, Circuit panels. For instance, in this case, the panel could have found support for the officers' use of force under the general standard of *Graham v. Connor*: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." *Graham v. Connor*, 490 U.S. 386, 396 (1989) citing *Terry v. Ohio*, 392 U.S. 1 (1968) and *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973). Therefore, in this matter, *Graham v. Connor* could support a finding that Officer Craig and Sgt. Toth's conduct was constitutional or that the law was not clearly established. *See also, Forrester v. City of San Diego, supra*, 25 F.3d at 806 (police officers not required to use the least intrusive degree of force possible; they are required only to act within a reasonable range of conduct).

In *Gravelet-Blondin, supra*, the Ninth Circuit ruled that force may be used to overcome even passive resistance: "While purely passive resistance can support the use of some force, the level of force an individual's resistance will support is dependent on the factual circumstances underlying that resistance." *Id.* at 1091, citing *Bryan v. MacPherson*, 630 F.3d 805, 830 (9th Cir. 2010). Further, in *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012), the Ninth Circuit reiterated the same rule that force may be used for effecting an arrest for passive resistance. *Id.* at 881, citing *Bryan v. MacPherson, supra*.

The panel opinion made no effort to compare the facts of this case with the facts of *Gravelet-Blondin*. Here, the officers were lawfully trying to check the welfare of the occupants in an apartment

with a known history of domestic violence. (App. 20.) Suddenly and without warning, Mr. Emmons, an unknown male opened the front door and backed out of the apartment pushing and coming into contact with Officer Craig who was by himself at the time. Officer Craig's demands not to close the door were ignored. (App. 21-22, 27.) Officer Craig grabbed hold of Mr. Emmons by his arm, told him to get on the ground several times, guided him to the ground in a control hold, placed him prone on the ground, and then handcuffed him. (App. 22, 30-31.) This Court has ruled that the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. *Graham v. Connor,* 490 U.S. 386, 396–97, (1989) (emphasis added) (citations omitted).

This event was video recorded. These recordings confirm that it was impossible for Officer Craig to know what Mr. Emmons' intentions were exiting the apartment where officers were obviously trying to enter. There was no evidence in the record to support the conclusion that any reasonable officer in Officer Craig's position could have known whether Mr. Emmons was leaving the scene of a crime, or carrying a concealed weapon or evidence of a crime. Thus, the Court's reliance on the fact that Mr. Emmons was later determined to be unarmed violates the standard that courts may not judge an officer's use of force using 20/20 hindsight. *See, Graham v. Connor, supra; White v. Pierce County,* 797 F.2d 812 (9th Cir. 1986)

II. The Panel's Sole Reliance on *Gravelet-Blondin* was Misplaced Because it was Published Four Months *After* the Incident in this Matter

The panel erroneously concluded that any constitutional violation was so clearly established that qualified immunity does not apply to Officer Craig and Sgt. Toth. Any constitutional violation was far from clearly established, especially given that Mr. Emmons did not and could not cite a similar case that put Officer Craig and Sgt. Toth on notice their conduct was unconstitutional. AOB 39-42. Mr. Emmons had the burden to prove the right was clearly established and has never done so. *Alston v. Read*, 663 F.3d 1094, 1098 (9th Cir. 2011)

The panel originally did not cite to any case in reversing qualified immunity and simply stated, "There is evidence from which a reasonable trier of fact could find that Mr. Emmons was unarmed and non-hostile. The district court therefore erred in granting qualified immunity on his excessive force claim." (App. 5-8.) Only after the officers' request for a rehearing did the panel advance a single case, *Gravelet-Blondin*, for the proposition that Mr. Emmons' rights had been clearly established. (App. 3-4.) This is clear error.

The panel simply cannot overturn the District Court's finding of qualified immunity, as they have done, based upon *Gravelet-Blondin*. *Gravelet-Blondin* was not decided until September 6, 2017, four months after the incident in this matter. A court cannot rely on a case decided after the event because

a reasonable officer is not required to foresee judicial decisions that do not yet exist. *Brosseau v. Haugen*, *supra*, 543 U.S. at 200, n. 4 (other cases postdating the conduct in question, of course, could not have given fair notice to Brosseau and are of no use in the clearly established inquiry). As the *Brosseau* Court noted, "[b]ecause the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." *Id.* at 198; *Kisela*, *supra*, 138 S.Ct. at 1152.

More recently, this Court in *Kisela* again restated the canon that the Ninth Circuit cannot rely on a case that postdated the conduct at issue.

> *Glenn*, which the panel described as "[t]he most analogous Ninth Circuit case," 862 F.3d, at 783, was decided after the shooting at issue here. Thus, *Glenn* "could not have given fair notice to [Kisela]" because a reasonable officer is not required to foresee judicial decisions that do not yet exist in instances where the requirements of the Fourth Amendment are far from obvious. *Brosseau*, 543 U.S., at 200, n. 4, 125 S.Ct. 596. *Glenn* was therefore "of no use in the clearly established inquiry."

Kisela v. Hughes, *supra*, 138 S.Ct. at 1154.

Making matters worse, the panel barred the officers from further filings in the Ninth Circuit for rehearing to resolve the panel's clear errors. (App. 37.)

III. The Panel Did Not Decide the Probable Cause Issue Raised by Emmons

Both Mr. Emmons and the officers moved for summary judgment on the False Arrest allegations in the Complaint. (App. 12-13, 19.) The District Court found that the officers had probable cause to believe Mr. Emmons had violated Penal Code § 148(a) and that the officers were entitled to qualified immunity on the claim. (App. 27-28.)

Mr. Emmons' appeal included the contention that the District Court erred in granting the officers summary judgment on all matters, including the judgment on his false arrest claim for relief pled in the First Cause of Action. AOB 40-42.

The Ninth Circuit, in both its original Memorandum decision and Amended Memorandum, failed to address this issue in any respect. (App. 1-4, 5-8, 36-37.)

The Ninth Circuit committed clear error in failing or refusing to consider and dispose of the issue briefed by both parties. The refusal to allow a petition for rehearing before the panel or *en banc* will create confusion with the District Court if this case is to be tried.

CONCLUSION

The Ninth Circuit continues to defy decades of clearly established jurisprudence on qualified immunity. The Court should grant the petition for a writ of certiorari and reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTY EMMONS; MAGGIE EMMONS,
Plaintiffs - Appellants,

v.

CITY OF ESCONDIDO; et al.,
Defendants – Appellees.

No. 16-55771
D.C. No.
3:14-CV-01662-JM-DHB

AMENDED MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Jeffrey T. Miller, District Judge, Presiding

Argued and Submitted February 6, 2018
Pasadena, California

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: GRABER and HURWITZ, Circuit Judges, and MARBLEY**, District Judge.

COUNSEL

Brody McBride, Esq., Singleton Law Firm, APC, for Plaintiffs.

Michael R. McGuinness, City of Escondido Office of the City Attorney, Escondido, CA for Defendants.

MEMORANDUM

Maggie Emmons and Marty Emmons appeal a summary judgment in this action under 42 U.S.C. § 1983 in favor of the City of Escondido and several City police officers.

1. We affirm the district court's judgment as to Ms. Emmons' claims. Although the Fourth Amendment generally bars warrantless entry, "[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (quoting *Mincey v. Arizona*, 437 U.S. 385, 392 (1978)). To determine whether such an emergency exists, we ask whether "(1) considering the totality of the circumstances, law enforcement had an objectively reasonable basis for

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** The Honorable Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

concluding that there was an immediate need to protect others or themselves from serious harm; and (2) the search's scope and manner were reasonable to meet the need." *United States v. Snipe*, 515 F.3d 947, 952 (9th Cir. 2008). Here officers had an objectively reasonable basis to conclude that there was a need to conduct a welfare check. *Cf. United States v. Brooks*, 367 F.3d 1128, 1135 (9th Cir. 2004) (holding that an emergency call reporting a potential assault in a hotel room, combined with the suspect's admission that someone inside the room had been "loud" and the fact that the room was in visible disarray, created an exigency that justified warrantless entry). Once inside the apartment, the officers reasonably limited the scope of the search to a welfare check. Furthermore, given the red flags the officers encountered at the scene, a reasonable officer could conclude that the potential emergency did not dissipate even though a woman outside the apartment identified herself as the subject of the 911 call.

2. As to Mr. Emmons, there is a genuine issue of material fact as to whether separating him from the house was accomplished with excessive force. We consider the following factors in determining if the use of force is excessive: "(1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Estate of Lopez ex rel. Lopez v. Gelhaus*, 871 F.3d 998, 1005 (9th Cir. 2017) (alteration in original) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)) (internal quotation marks omitted). There is evidence from which a

reasonable trier of fact could find that Mr. Emmons was unarmed and non-hostile. The right to be free of excessive force was clearly established at the time of the events in question. *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013). Accordingly, as to Defendants Craig and Toth, the district court erred in granting qualified immunity on Mr. Emmons' excessive force claim. But there is no genuine issue of material fact with respect to any other defendant's participation in the alleged excessive force incident, so summary judgment was proper as to all other defendants.

AFFIRMED in part and REVERSED in part. Each party is to bear its own costs on appeal.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTY EMMONS; MAGGIE EMMONS,
Plaintiffs - Appellants,

v.

CITY OF ESCONDIDO; et al.,
Defendants – Appellees.

No. 16-55771
D.C. No.
3:14-CV-01662-JM-DHB

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Jeffrey T. Miller, District Judge, Presiding

Argued and Submitted February 6, 2018
Pasadena, California

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: GRABER and HURWITZ, Circuit Judges, and MARBLEY**, District Judge.

COUNSEL

Brody McBride, Esq., Singleton Law Firm, APC, for Plaintiffs.

Michael R. McGuinness, City of Escondido Office of the City Attorney, Escondido, CA for Defendants.

MEMORANDUM

Maggie Emmons and Marty Emmons appeal a summary judgment in this action under 42 U.S.C. § 1983 in favor of the City of Escondido and several City police officers.

1. We affirm the district court's judgment as to Ms. Emmons' claims. Although the Fourth Amendment generally bars warrantless entry, "[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (quoting *Mincey v. Arizona*, 437 U.S. 385, 392 (1978)). To determine whether such an emergency exists, we ask whether "(1) considering the totality of the circumstances, law enforcement had an objectively reasonable basis for

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** The Honorable Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

concluding that there was an immediate need to protect others or themselves from serious harm; and (2) the search's scope and manner were reasonable to meet the need." *United States v. Snipe*, 515 F.3d 947, 952 (9th Cir. 2008). Here officers had an objectively reasonable basis to conclude that there was a need to conduct a welfare check. *Cf. United States v. Brooks*, 367 F.3d 1128, 1135 (9th Cir. 2004) (holding that an emergency call reporting a potential assault in a hotel room, combined with the suspect's admission that someone inside the room had been "loud" and the fact that the room was in visible disarray, created an exigency that justified warrantless entry). Once inside the apartment, the officers reasonably limited the scope of the search to a welfare check. Furthermore, given the red flags the officers encountered at the scene, a reasonable officer could conclude that the potential emergency did not dissipate even though a woman outside the apartment identified herself as the subject of the 911 call.

2. As to Mr. Emmons, there is a genuine issue of material fact as to whether separating him from the house was accomplished with excessive force. We consider the following factors in determining if the use of force is excessive: "(1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Estate of Lopez ex rel. Lopez v. Gelhaus*, 871 F.3d 998, 1005 (9th Cir. 2017) (alteration in original) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)) (internal quotation marks omitted). There is evidence from which a

reasonable trier of fact could find that Mr. Emmons was unarmed and non-hostile. The district court therefore erred in granting qualified immunity on his excessive force claim.

AFFIRMED in part and REVERSED in part. Each party is to bear its own costs on appeal.

APPENDIX C

Marty EMMONS, et al., Plaintiffs

v.

CITY OF ESCONDIDO, et al., Defendants.
No. 14CV12662 JM (DHB)
United States District Court,
S.D. California.
Apr. 27, 2016

Brody McBride, Esq., Singleton Law Firm, APC, for Plaintiffs.

Michael R. McGuinness, City of Escondido Office of the City Attorney, Escondido, CA for Defendants.

ORDER GRANTING MOTION FOR RECONSIDERATION

MILLER, District Judge.

Defendants City of Escondido, Craig Carter, Kevin Toth, Robert Craig, Jake Houchin, Cory Moles and Joseph Leffingwell move to correct several perceived errors in this court's March 2, 2016 Order Granting Motion for Summary Judgment in Favor of Defendants and Against Plaintiffs ("Order").

Plaintiffs Marty Emmons and Maggie Emmons do not oppose the motion.

Reconsideration is generally appropriate "if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law. . . . There may also be other, highly unusual circumstances warranting reconsideration." School Dist. No. 1J, Multnomah County, Oregon v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993) (citations omitted); Fed.R.Civ.P. 60(b). The court makes the following corrections or clarifications: (1) summary judgment is granted in favor of Craig Carter on all claims asserted against him, to the extent there is any confusion (the Order identifies Craig Carter as one of the movants); (2) summary judgment is granted in favor of Cory Moles on all claims asserted against him (this defendant was inadvertently omitted from the Order); (3) references to defendant Huy Quach are removed from the Order (the parties stipulated to his dismissal prior to issuance of the Order); and (4) references to defendant "Leffinwell" are corrected to "Leffingwell."

In sum, the court grants the motion for reconsideration and instructs the Clerk of Court to enter judgment in favor of Defendants and against Plaintiffs on all claims alleged in the First Amended Complaint.

IT SO ORDERED.

DATED: April 26, 2016 /s/ Jeffrey T. Miller
Hon. Jeffrey T. Miller
United States
District Judge

cc: All parties

APPENDIX D

Marty EMMONS, et al., Plaintiffs

v.

CITY OF ESCONDIDO, et al., Defendants.
No. 14CV12662 JM (DHB)
United States District Court,
S.D. California.
Mar. 2, 2016

Brody McBride, Esq., Singleton Law Firm, APC, for Plaintiffs.

Michael R. McGuinness, City of Escondido Office of the City Attorney, Escondido, CA for Defendants.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AND AGAINST PLAINTIFFS

MILLER, District Judge.

Plaintiffs Marty Emmons ("Mr. Emmons") and his daughter Maggie Emmons (Ms. Emmons") move for summary judgment on their First, Second, and Third causes of action asserted in the First Amended Complaint ("FAC"). Defendants City of Escondido,

Craig Carter, Kevin Toth, Robert Craig, Huy Quach, Jake Houchin and Joseph Leffinwell oppose the motion and separately move for summary judgment on the same claims. Pursuant to Local Rule 7.1(d)(1), the court finds the matters presented appropriate for decision without oral argument. For the reasons set forth below, the court grants summary judgment in favor of Defendants Craig Carter, Kevin Toth, Richard Craig, Huy Quach, Jake Houchin and Joseph Leffinwell, and against Plaintiffs, on the First, Second, and Third causes of action.

At the outset, the court notes that the evidentiary record contains video and audio recordings of the underlying incident at issue. While not a panacea, these recordings provide significant context and color to the events which occurred on May 27, 2013. The body-worn camera provides a technological aide to better serve the community by protecting both police officers and citizens. An accurate depiction of the contacts between the police and community improves public safety, provides an objective means for evidence gathering, and serves as a valuable training tool for police officers.

BACKGROUND

On May 27, 2014, Plaintiffs commenced this federal question action by alleging six causes of action for violation of the Civil Rights Act, 42 U.S.C. §1983, and one claim for violation of the Bane Act, Cal. Civil Code §§52.1 and 52.3. Precisely one year prior to filing the complaint, on May 27, 2013, Plaintiffs allege that Defendants violated their civil rights when police

officers responded to a 911 call. On that date, the mother of Ms. Emmons' roommate, Trina Douglas, while speaking with her daughter, Ametria Douglas ("Ms. Douglas"), called 911 to report what she believed was an on-going fight at the apartment. Trina Douglas "called 911 in the hopes that someone would check on the well-being of her daughter." (FAC ¶23).

Officers Craig and Houchin were dispatched to conduct a welfare check on the occupants of the residence. Upon arrival the Officers encountered Ms. Douglas, the subject of the 911 call, in the pool with Ms. Emmons's children. Ms. Douglas allegedly told the officers that "she was fine and there was no need to go inside Ms. Emmons's residence." Nevertheless, the Officers proceeded to the door of Ms. Emmons's residence. Unbeknownst to the Officers, Mr. Emmons was inside the residence with his daughter.

Ms. Emmons denied the Officers request to enter the residence. Ms. Emmons spoke to the Officers through a window on the side of her residence and continued to refuse entry to the residence. The Officers insisted on entering the premises and informed Ms. Emmons that additional police officers would respond and would force entry into the residence unless they were allowed to enter the residence. (TAC ¶29). Ms. Emmons insisted that the Officers needed a search warrant before entering the home. (Compl. ¶32). By this time, Sergeant Toth and Officers Leffinwell and Quach responded to the call for support.

Mr. Emmons then "unlocked and opened the front door, and exited his daughter's residence through the front door. Officer Craig stepped up and demanded that Mr. Emmons not close the door. As Mr. Emmons stepped out, Officer Craig then attempted to force the door open with his foot. Mr. Emmons brushed past Officer Craig and closed the door behind him." (TAC ¶35). Officer Craig then grabbed Mr. Emmons and forced him to the ground, injuring his back. (TAC ¶¶36, 37). The Officers then entered and searched the residence.

Mr. Emmons was arrested and cited for violation of Penal Code §148(a) for resisting and delaying a peace officer and then released. (FAC ¶44). The District Attorney's Office dismissed the case against Mr. Emmons in February 2014.

Based upon this generally described conduct, Plaintiffs allege six civil rights claims: (1) unlawful seizure, arrest, and detention; (2) excessive force; (3) unreasonable search without a warrant; (4) municipal liability under *Monell*; (5) failure to train; and (6) failure to supervise and discipline. Plaintiffs also allege a single state law claim for violation of the Bane Act. The parties have jointly moved to dismiss the Bane Act claim and to dismiss Defendant Huy Quach as a party. (ECF 22).

DISCUSSION

Legal Standards

A motion for summary judgment shall be granted where "there is no genuine issue as to any

material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Prison Legal News v. Lehman*, 397 F.3d 692, 698 (9th Cir. 2005). The moving party bears the initial burden of informing the court of the basis for its motion and identifying those portions of the file which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim." *Id.* (emphasis in original). The opposing party cannot rest on the mere allegations or denials of a pleading, but must "go beyond the pleadings and by [the party's] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (citation omitted). The opposing party also may not rely solely on conclusory allegations unsupported by factual data. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

The court must examine the evidence in the light most favorable to the nonmoving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Any doubt as to the existence of any issue of material fact requires denial of the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). On a motion for summary judgment, when "'the *moving party* bears the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence were uncontroverted at trial.'" *Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir. 1992) (emphasis in original) (quoting *International*

Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1264-65 (5th Cir. 1991), *cert. denied*, 502 U.S. 1059 (1992)).

Qualified Immunity

The Supreme Court recently summarized the doctrine of qualified immunity.

> The doctrine of qualified immunity shields officials from civil liability so long as their conduct " 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). A clearly established right is one that is "sufficiently clear that every reasonable official *would have understood that what he is doing violates that right.*" *Reichle v. Howards*, 566 U.S. ——, ——, 132 S.Ct. 2088, 2093, 182 L.Ed.2d 985 (2012) (internal quotation marks and alteration omitted). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al–Kidd*, 563 U.S. 731, 741, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011). Put simply, qualified immunity protects "all but the plainly incompetent or those who

knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986).

"We have repeatedly told courts ... not to define clearly established law at a high level of generality." *al–Kidd*, supra, at 742, 131 S.Ct. 2074. The dispositive question is "whether the violative nature of particular conduct is clearly established." Ibid. (emphasis added). This inquiry " 'must be undertaken in light of the specific context of the case, not as a broad general proposition.' " *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (per curiam) (quoting *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that "[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." 533 U.S., at 205, 121 S.Ct. 2151.

Mullenix v. Luna, – U.S. – , 136 S.Ct. 305, 308, 193 L.Ed.2d 255 (2015).

The Motion

The parties cross-move for summary judgment on the First (False Detention/Arrest), Second (Excessive Force), and Third (Unlawful Search) Causes of Action asserted against the individual Defendants. The court reviews the undisputed evidentiary record - with focus on the events leading up to Plaintiffs' claims – before identifying whether the specific Fourth Amendment rights at issue were violated and/or are clearly established.[1]

On May 27, 2013, at around 2:30 p.m., the Escondido Police Dispatch received a 911 call from Trina Douglas, the mother of Ms. Douglas, Ms. Emmons's roommate. Trina Douglas reported that she lived in Los Angeles and was speaking with her daughter when Ms. Emmons started a fight. Trina Douglas could hear her daughter screaming for help when the telephone line went dead. She tried to call back but no one answered the telephone. Trina Douglas also informed dispatch that there were two children in the home.

At around 2:40 p.m., Defendant Officers Houchin and Craig were dispatched to Ms. Emmons's apartment, a second floor unit. They received the following dispatch on the patrol unit computer:

> WC [Welfare Check] on RP's [Reporting Party] 24 yo daughter Ametria Douglas.

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[1] The video recording of the incident plays an instrumental role in establishing the undisputed evidentiary record.

> RP was speaking to daughter on phone. Daughter's female roommate came home, started some kind of 415. Was screaming and jumping to Ametria. Ametria screamed into phone for her mother to help, then phone disconnect. No answer on call back. Two children also in resd.

A "415" is a common abbreviation for California Penal Code §415 and used to cover diverse events such as fights, arguments, and other disturbances. Officer Craig viewed the telephone call as an emergency situation and was concerned for the welfare of the occupants of the apartment. About one month earlier, Officer Houchin responded to a 911 call from Ms. Emmons at the same apartment where she reported that her husband had injured her. Officer Houchin was involved in taking the domestic violence report.

Shortly thereafter, the officers, dressed in uniform, activated their body video cameras, and Officer Craig knocked on the door while Officer Houchin contacted Ms. Emmons at a side window adjacent to the walkway. Ms. Emmons refused to open the door to permit the officers to perform a welfare check walk-through the apartment. After about 1 ½ minutes, a request was made for additional assistance should a forced entry into the apartment become necessary. After about 6 minutes at the scene, Ms. Emmons did inform the officers that her boys had been screaming earlier when she threatened to hit them.

While the officers were at the apartment, a woman at the pool with two children asked the police what was happening. One unidentified officer responded that "this doesn't concern you." The woman responded that she was Ametria Douglas and lives in the apartment. She said, "I live here. You can leave. There's no reason for you to be here anymore. You can see I'm fine, and I'm with the boys. Everything is fine." Officer Craig testified that Ms. Douglas's manner of reporting and demeanor raised a "red flag" that was inconsistent with there being no problem at the apartment. The officers did not confirm Ms. Douglas's identify and relationship to the apartment until after the events giving rise to Plaintiffs' claims.

The officers asked Ms. Douglas to come to the apartment and let them do a welfare check or talk to Ms. Emmons. From the window, Ms. Emmons told Ms. Douglas not to speak with the police. She continued to refuse entry to the police. Mr. Emmons also spoke with the police from the window. He told the police that he and his daughter were the only occupants of the apartment.

About 9 - 10 minutes after arriving on the scene, Mr. Emmons unlocked and opened the door. Officer Craig instructed Mr. Emmons to not close the door, to raise his hands, and to get on the ground. Mr. Emmons did not hear the command to not close the door. Officer Craig was also aware of the earlier domestic violence incident at the apartment and did not know the identity of the individual who just exited the apartment. As Mr. Emmons exited, he brushed past Officer Craig who was in the process of arresting

him for violation of Penal Code §148 because he closed the door when instructed not to. Officer Craig then grabbed Mr. Emmons's arm, told him to get to the ground, placed him on the ground, and then handcuffed him. Officer Craig did not display any weapon or strike or threaten him. Within about two minutes of securing Mr. Emmons, Officer Craig helped Mr. Emmons to stand-up. Mr. Emmons testified that he was tackled to the ground.

Defendant Officers Toth and Leffingwell arrived at the scene by the time of Mr. Emmons's arrrest and Officer Toth spoke with Mr. Emmons to see if he wanted to sit down. While this conversation was on-going, Officer Leffingwell, a specially trained Psychological Emergency Response Team Officer ("PERT"), spoke with Ms. Emmons through the window. He was unaware of the previous unsuccessful efforts to gain entrance to the apartment. Shortly thereafter, Ms. Emmons unlocked the door and told the officer "to walk anywhere you want to walk." The walk-through of the apartment lasted for about one minute.

The Search of the Apartment

Of course, an unconstitutional entry into one's home constitutes "paradigmatic" action under the Fourth Amendment, *Michigan v. Tyler*, 436 U.S. 499, 504 (1978), whether to obtain evidence or to search for potential injured victims. The Fourth Amendment demands that government officials obtain consent, possess a warrant, or demonstrate exigent

circumstances before entering one's home. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990).

Here, Ms. Emmons cannot prevail on her illegal search claim for two different reasons. First, Plaintiff fails to identify any authority which clearly establishes that police officers may not enter a home to conduct a welfare check once an emergency telephone call is placed to 911, the caller indicates that an altercation is in process, the caller requests help, the telephone line goes dead and the caller does not answer a 911 callback, officers arrive at the scene and the occupant of the home, a recent victim of domestic abuse, refuses to allow the officers to enter the home to conduct a welfare search. It is well-established that the "emergency doctrine allows law enforcement officers to enter and secure premises without a warrant when they are responding to a perceived emergency." *United States v. Stafford*, 416 F.3d 1068, 1073 (9th Cir. 2005).

Plaintiff argues that the "officers had no reasonable grounds to believe there was an emergency at hand and an immediate need for their assistance for the protection of life or property." (Oppo. at p.21:12-14). Plaintiff argues that officers must first obtain independent confirming evidence before acting on an emergency call like that in *United States v. Brooks*, 367 F.3d 1128 (9th Cir. 2004), where the police heard loud fighting coming from the hotel room when they arrived on site, or *United States v. Brown*, 392 Fed. Appx.515 (9th Cir. 2010), where two 911 emergency calls were placed concerning the same event, and not just one call. These authorities are not

helpful to Plaintiff. The cited authorities simply fail to provide sufficient notice that the welfare check on Plaintiff's apartment under the circumstances of this case did not fall within the traditional exigent circumstances exception to the warrant requirement of the Fourth Amendment.

The second reason Plaintiff's argument fails is that she gave her consent to Officer Leffingwell to conduct a welfare check of the apartment. Plaintiff fails to establish a Fourth Amendment violation. The Defendants' undisputed evidence shows that Officer Leffingwell, a trained PERT officer, spoke with Ms. Emmons through the window and she told him that he could walk through the apartment. While coercion is undoubtably a question of fact whenever there are genuine issues of material fact, Plaintiff does not present any substantial evidence of coercion, including any evidence of the standard indicia of coercion (i.e there is no evidence that force, weapons, shouts or impermissible threats or promises were used by Officer Leffingwell to gain access to the apartment). Rather, Plaintiff argues, without citation to the record or legal authority, that her consent was coerced because she "was in fact terrified for the safety of her father and children who were at this point screaming from the pool in response to the officers arresting their grandfather." (Oppo. at p.9:4-6). Evidence that Plaintiff "felt like she didn't have a choice," or "did not want to let any officer into her home," or was motivated because the police told her (lawfully) that "they were going to bust down" the door if she did not allow a welfare check, (Plfs Motion at p.12:3-12), does not negate Plaintiff's consent nor create a genuine issue of material fact regarding the

voluntariness of Plaintiff's consent. Plaintiff's subjective beliefs and prejudices are not relevant considerations under the totality of the circumstances test of the Fourth Amendment. See *Illinois*, 497 U.S. 177, *Mincey v. Arizona*, 437 U.S. 385, 392 (1978).[2]

Finally, the court reject's Plaintiff's arguments that the Fourth Amendment was violated because (1) the police officers did not reasonably believe there was an emergency (i.e. sirens were not employed by the police while on route to the apartment, Officer Houchin called for other officers and a supervisor instead of immediately entering the apartment) and (2) the police officers could have, and should have, conducted a more thorough investigation before seeking to enter the apartment (i.e. Officers Craig and Hutchin could have listened to the 911 tape themselves, called Ms. Douglas's mother to learn more about the incident, asked more questions of Ms. Douglas while at the pool, interviewed the neighbors to discover more information, (Reply at p.2:19-27)). As set forth above, a constitutional right is clearly established when it is "sufficiently clear that every reasonable official would have understood that what

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[2] Ms. Emmons also claims that the officers did 2 not explain until late in the series of events why they came to her apartment. While Ms. Emmons may not have understood why the officers were there until later, the body camera video clearly shows that the officers repeatedly and exhaustively explained their presence at the site. During this time, the officers were consistently professional and courteous in their discussions with Plaintiff. Some of the first words uttered by the officers were to explain that they were there to conduct a welfare check on the occupants of the apartment. (Notice Lodgement, Exh. 1). The video also reveals that the officers attempted to de-escalate the situation.

he is doing violates that right." *Reichle v. Howard* 566 U.S. __, __, 132 S.Ct. 2088, 2093 (2012). Plaintiff's failure to cite legal authorities in support of the circumstances of this case is fatal to this claim.

In sum, because Plaintiffs have failed to establish that Defendants, or any of them, violated any clearly established cognizable right under 42 U.S.C. §1983, the court grants summary judgment in favor of all Defendants and against Plaintiff Ms. Emmons on the unlawful search claim (Count 3).

False Detention/Arrest

In a one-half page argument, Mr. Emmons moves for summary judgment on both the false arrest and excessive force claims. (Motion at p.23:9-25). Mr. Emmons contends that he did not disobey the Officers and that taking him to the ground after his arrest constituted excessive force. The court concludes that Plaintiff fails to establish any genuine issue of material fact on the question of whether the arrest of Mr. Emmons violated clearly established law.

To prevail on the false arrest claim under §1983, one must establish that an arrest was made without probable cause. See *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir.1998) ("To prevail on his section 1983 claim for false arrest ... [the plaintiff] would have to demonstrate that there was no probable cause to arrest him."). "Probable cause exists when the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to

warrant a prudent man in believing that the plaintiff had committed or was committing an offense." *Hart v. Parks*, 450 F.3d 1059, 1065–66 (9th Cir.2006) (citations and quotations omitted). The undisputed evidence reveals that Mr. Emmons sought to exit the apartment at a time of rapidly developing circumstances at the scene, discussed above, and, as he did, he was instructed by Officer Craig to not close the door. Both officers testified that Mr. Emmons was so instructed and, moreover, the body camera reveals that Mr. Emmons was instructed: "Don't close the door." (McGuinness Decl. Exh. 1 at p.10:11).

In his motion, Mr. Emmons contends that he did not disobey or otherwise obstruct the officers. (Motion at p.23:10-11). However, Plaintiff does not explain how this is so. Not only does the testimony of both officers demonstrate that Mr. Emmons was instructed not to close the door, but objective evidence in the form of the bodyworn camera reveals that Mr. Emmons was so instructed. The TAC also alleges that Officer Craig told Mr. Emmons not to close the door before he closed it. (TAC ¶35). While Mr. Emmons may not have "heard" the instruction, or seen the officers outside the door when he exited the apartment, the objective evidence reveals that the officers had probable cause - based on the totality of the circumstances - to believe that Mr. Emmons violated Penal Code §148(a) for resisting and delaying a peace officer who was lawfully attempting to enter the apartment to conduct a welfare check.[3] As such,

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[3] The videotape shows that Officer Craig was standing a few feet from the front door when Mr. Emmons hurriedly existed

not only does Mr. Emmons fail to establish a claim for false arrest, but Defendants are also entitled to qualified immunity on the false arrest claim as Plaintiff fails to cite any relevant authorities which would provide notice to the officers that their conduct violated Mr. Emmons's constitutional rights.

In sum, the court grants summary judgment in favor of Defendants and against Plaintiffs on the false arrest claim (Count 1).

Excessive Force

Mr. Emmons contends that the officers used excessive force when he was "tackled" to the ground and placed under arrest. He contends that his crime was simply closing the door, he posed no threat to the police officers, and he never actively sought to evade arrest. Plaintiff cites no evidence to support these broad conclusions. (Motion at p.23:17-25). The court concludes that Defendant Officer Craig is entitled to summary judgment on the second prong of the qualified immunity test because relevant legal authorities do not establish that the underlying challenged conduct violates clearly established law.[4]

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the apartment and Officer Craig instructed Mr. Emmons to not close the door. (Notice of Lodgment, Exh. 1).

[4] As the evidence demonstrates that 4 only Defendant Craig was involved in the excessive force claim, and Plaintiff fails to identify contrary evidence, the court grants summary judgment on this claim in favor of Defendants Craig Carter, Kevin Toth, Huy Quach, Jake Houchin and Joseph

The Fourth Amendment prohibition against unreasonable seizures permits law enforcement officers to use only such force to effect an arrest as is "objectively reasonable" under the circumstances. *Graham v. Connor*, 490 U.S. 386, 397 (1989); *Headwaters Forest Defense v. County of Humboldt*, 240 F.3d 1185, 1198 (9th Cir. 2001). Because the Fourth Amendment test for reasonableness is inherently fact-specific, *see Chew v. Gates*, 27 F.3d 1432, 1443 (9th Cir. 1994) (citing *Reed v. Hoy*, 909 F.2d 324, 330 (9th Cir. 1989)), it is a test that escapes "mechanical application" and "requires careful attention to the facts and circumstances of each particular case." *Graham*, 490 U.S. at 396; *Fikes v. Cleghorn*, 47 F.3d 1011, 1014 (9th Cir. 1995). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396.

Thus, in order to prove a Fourth Amendment claim of excessive force under 42 U.S.C. § 1983, Plaintiff must present evidence which shows: "(1) the severity of the crime at issue, (2) whether the suspect pose[d] an immediate threat to the safety of the officers or others, . . . (3) whether he [was] actively resisting arrest or attempting to evade arrest by flight," and any other "exigent circumstances [that] existed at the time of the arrest." *Chew*, 27 F.3d at 1440-41 & n.5 (citing *Graham*, 490 U.S. at 396).

Leffinwell on the second cause of action. The excessive force claim against Officer Craig requires further analysis.

In all, police officers are not required to use the least intrusive degree of force possible; they are required only to act within a reasonable range of conduct. *See Forrester v. City of San Diego*, 25 F.3d 804, 806 (9th Cir. 1994). In fact, an officer's right to make an arrest, as opposed to detaining someone, necessarily includes the right to use some degree of force. *Graham*, 490 U.S. at 396; *Cunningham v. Gates*, 229 F.3d 1271, 1290 (9th Cir. 2000); *see also* Cal. Penal Code § 835a ("A peace officer who attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested.").

On the first prong of the qualified immunity analysis, genuine issues of material fact preclude summary judgment on whether Officer Craig used a reasonable amount of force under the circumstances. Defendants come forward with evidence to show that Mr. Emmons was arrested when he exited the apartment and closed the door to the apartment after being instructed to keep the door open. Defendant Officer Craig testified that he arrested Mr. Emmons for violation of Penal Code §148, and then guided Mr. Emmons to the ground before handcuffing him and then helping him to his feet. This evidence is sufficient to establish that the force applied was reasonable under the circumstances and the burden shifts to Mr. Emmons to demonstrate a genuine issue of material fact.

On the other hand, the testimony of Mr. Emmons, however brief, contradicts Defendants' evidence. Mr. Emmons testified that he was tackled

to the ground and injured his back in the process. While this evidence is "thin," it places in dispute the level of force that was used by Officer Craig: was Mr. Emmons "guided" to the ground or "tackled?"[5]

Moreover, a careful review of the videotape of the encounter between Mr. Emmons and Officer Craig reveals that the video is inconclusive on the question of the force applied to Mr. Emmons. The court notes that if a picture is worth a thousand words, a video from the body-worn camera of a law enforcement officer during a "contact" giving rise to litigation may be worth a thousand pictures. Such is the case here. The video shows that the officers acted professionally and respectfully in their encounter with Plaintiffs. However, at the point of Mr. Emmons arrest, Officer Craig was so close to Mr. Emmons that the videotape does not show the force used when Mr. Emmons was physically taken to, or placed on, the ground. The image is not clear enough to make determinations as a matter of law.

The court concludes, however, that even though the evidence is in conflict on the level of force employed (i.e. whether it was a "guiding" to the ground, a "tackle," or something in between the two), it is the second step of a qualified immunity analysis that is ultimately dispositive in this case.

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[5] The court notes that Mr. Emmons does not testify that he was body slammed or punched, only that he was tackled. Mr. Emmons does not explain what he means by the term "tackled." He sheds no additional light on the degree of force applied, or injury suffered, when he was taken to the ground.

With respect to qualified immunity, the second step in the analysis is to determine whether the constitutional right being advanced was clearly established in the relevant context such that a "reasonable official would have understood that what he is doing violates that right." *Al-Kidd*, 131 S.Ct. at 2083. The Supreme Court made clear in *Saucier* that the "reasonableness of the officer's belief as to the appropriate level of force should be judged from the on-scene perspective." 533 U.S. at 205. In the event a police officer reasonably, but mistakenly, believes more force is required because of a perceived threat, the officer is entitled to qualified immunity. *Id.* As noted by the Supreme Court:

> The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense

Id.

In *Saucier*, during a speech by then Vice President Gore at an event to celebrate the conversion of an army base to a national park, the plaintiff displayed a large banner stating "Please Keep Animal Torture Out of Our National Parks." As plaintiff approached a fence separating the spectators from the speakers, two military federal police officers grabbed plaintiff from behind and half-walked and half-dragged him to a nearby military van where he was shoved or thrown inside. In reversing the Ninth Circuit's denial of qualified immunity, the Supreme Court highlighted that the step one analysis (i.e. whether the amount of force used was reasonable) is different from the step two analysis and does not merge into a single inquiry into the "reasonableness" of the force at issue. Noting that there were no clearly established authorities prohibiting defendant from dragging plaintiff and then shoving or throwing plaintiff to the floor of the van, the Supreme Court granted summary judgment on immunity grounds in favor of the officer. The Supreme Court reasoned that the officer did not know the full extent of the threat to the Vice President, there were other potential protesters in the crowd, and there was some degree of urgency. Notwithstanding the dragging and throwing plaintiff to the ground, the Supreme Court granted immunity to the officer noting that there are no legal authorities demonstrating a clearly established rule prohibiting the officer from acting as he did under the circumstances. *Id.* at 209.

Here, applying the *Graham* framework, 490 U.S. at 396, the officers were tasked to perform a welfare check following a 911 call wherein a mother was speaking with her daughter on the telephone

when an argument or fight broke out at the apartment and the daughter asked her mother for help when the telephone line went dead. Upon arrival at the scene, Officer Craig learned that the police recently responded to a domestic violence incident at the apartment. Upon arrival, the police officers instructed Ms. Emmons to open the door in order for the police to conduct a welfare check. Ms. Emmons escalated the encounter by refusing to comply with the officers' lawful instructions. The officers called for a supervisor and backup. When an unidentified male exited the apartment, the officers did not know who he was or whether he presented a security threat or whether injured individuals were inside the apartment. When he did not comply with Officer Craig's order to not close the door in this rapidly escalating series of events, Officer Craig testified that he guided Mr. Emmons to the ground and arrested him. Mr. Emmons testified that he was tackled to the ground. Mr. Emmons provides no further description of the events leading to his being placed on the ground. A "tackle," in the context of football means "to seize and bring down (another player)." *Webster's II New College Dictionary* 1121 (1995). A tackle is not synonymous with excessive force. There is no evidence that Mr. Emmons was bodyslammed, treated sadistically, or otherwise subject to excessive force, only that Mr. Emmons was taken to the ground and handcuffed.

Under qualified immunity principles, Plaintiff fails to cite any legal authorities for the proposition that guiding or even tackling an arrested individual to the ground under similar, or the present circumstances, is unconstitutional. There are simply

no cited legal authorities clearly establishing that the tackle or take-down of Mr. Emmons violates the Fourth Amendment. Further, in the absence of authorities, the officers were not provided with "fair warning that their conduct was unlawful." *Elliot-Park v. Mangola*, 592 F.3d 1003, 1008 (9th Cir.2010). As the doctrine of qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law," *Malley*, 475 U.S. at 341, the court finds that Officer Craig is entitled to qualified immunity on Mr. Emmons's excessive force claim brought under 42 U.S./C. §1983.

In sum, the court grants summary judgment in favor of Defendants Craig Carter, Kevin Toth, Robert Craig, Huy Quach, Jake Houchin and Joseph Leffinwell, and against Plaintiffs, on the First, Second, and Third Causes of Action.

IT SO ORDERED.

DATED: March 2, 2016 /s/ Jeffrey T. Miller
Hon. Jeffrey T. Miller
United States
District Judge

cc: All parties

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTY EMMONS; MAGGIE EMMONS,
Plaintiffs - Appellants,

v.

CITY OF ESCONDIDO; et al.,
Defendants – Appellees.

No. 16-55771
D.C. No. 3:14-CV-01662-JM-DHB
Southern District of California,
San Diego

[DATE STAMP]
FILED
MAR 29 2018
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ORDER

Before: GRABER and HURWITZ, Circuit Judges, and MARBLEY*, District Judge.

The petition for panel rehearing, Docket Entry No. 35, is GRANTED. The memorandum disposition filed February 22, 2018, is amended by the disposition filed contemporaneously with this order as follows:

Replace the sentence on page 3, lines 10–11, beginning with <The district court therefore> with the following:

> The right to be free of excessive force was clearly established at the time of the events in question. *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013). Accordingly, as to Defendants Craig and Toth, the district court erred in granting qualified immunity on Mr. Emmons' excessive force claim. But there is no genuine issue of material fact with respect to any other defendant's participation in the alleged excessive force incident, so summary judgment was proper as to all other defendants

No further petitions for panel rehearing or rehearing en banc may be filed.

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* The Honorable Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

No. 17-1660

IN

The Supreme Court of The United States

CITY OF ESCONDIDO, KEVIN TOTH, AND ROBERT CRAIG,

PETITIONERS,

V.

MARTY EMMONS,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Despite the admonition in Supreme Court Rule 14.1(a) that questions presented "should be short and should not be argumentative," Petitioners begin their Questions Presented with at least six *disputed* facts: (1) that police were responding to a "domestic violence" call; (2) that Respondent Marty Emmons was entirely "unknown" at the time he was arrested; (3) that Mr. Emmons "hastily" exited the subject apartment; (4) that Petitioners Kevin Toth and Robert Craig were conducting a "lawful" welfare check when Mr. Emmons was arrested; and (5) that Mr. Emmons has "cited *no* legal authorities for the proposition that the nature of the force was excessive."

Mr. Emmons would re-state Petitioners' Questions Presented as a single question:

1. Did the Ninth Circuit err in holding Petitioners Kevin Toth and Robert Craig were not entitled to summary judgment, on the issue of whether they are immune from having to defend against Mr. Emmons' claim, that they violated the Fourth Amendment, when they arrested and used force on Mr. Emmons?

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INTRODUCTION

Despite there being no indication of an ongoing emergency when police officers arrived at the Escondido apartment of Respondent Marty Emmons' daughter, in response to a 911 report from a caller in Los Angeles, the officers insisted on searching the apartment.

When Mr. Emmons' exited the apartment to explain his daughter's insistence on a search warrant, Officer Craig forced Mr. Emmons to the ground and held him there with Sergeant Toth's help, thus injuring Mr. Emmons' back and hip. Mr. Emmons was then arrested for interfering with the officers' quest to get inside the apartment.

The Ninth Circuit did not err in this case when, on interlocutory appeal, it assumed all disputes of fact were resolved in Mr. Emmons' favor, then concluded Mr. Emmons' Fourth Amendment right to be free from unreasonable seizures was "clearly established" under the circumstances of this case.

The Petition should be denied.

STATEMENT OF THE CASE

I. Facts

A. The Police Arrive to Everyone's Surprise

In 2013, Maggie Emmons lived in an apartment in Escondido, California with her husband (who was working in Rhode Island at the time), two young sons, and roommate, Ametria Douglas. ER057, ER075, ER086, ER107.

On Memorial Day, May 27, 2013, Respondent Marty Emmons was visiting his daughter, Maggie Emmons, and grandsons at their Escondido apartment. ER060, ER087, ER106.

In the early afternoon that day, Ms. Emmons' roommate, Ms. Douglas, was talking on the phone with her mother when Ms. Douglas' phone unexpectedly stopped working. ER097. Thinking nothing of it, Ms. Douglas soon took Ms. Emmons' sons to play at the apartment complex pool. ER109.

A while after Ms. Douglas took the boys to the pool, the police showed up. ER111. When they responded, the officers had no information confirming the veracity of what the 911 caller had reported. ER233. And the officers did not, either before or during the incident, listen to the 911 call or attempt to contact the 911 caller for more information. ER231-ER232.

Importantly, there was no indication that this was a "domestic violence" call as the term is defined by California Penal Code sections 273.5 and 243(e)(1). The term "domestic violence" applies only to violence between individuals involved in a current or former intimate/romantic relationship. *See People v. Belton*, 168 Cal. App. 4th 432 (2008) ("For purposes of section 273.5, the term 'cohabitant' 'requires something more than a platonic, rooming-house arrangement.'"). Here, of course, officers were responding to a reported verbal altercation between two adult women roommates.

From the pool, Ms. Douglas was the first to see Officer Craig arrive, along with Officer Jake Houchin, who is not a party to this proceeding,[1] Ms. Douglas saw these officers approach and knock on the door to Ms. Emmons' apartment.[2] ER088-ER089. At the time, Ms. Emmons' sons were playing and splashing in the pool, and no one else was around. ER099, ER248.

Officer Craig "had no idea" if there was an ongoing emergency and had no information that

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[1] Mr. Emmons and his daughter had stayed in the apartment, watching a movie. ER088.

[2] The pool is situated directly under the landing of Ms. Emmons' apartment; thus, Ms. Douglas could see and hear what was happening near the front door of the apartment. ER089. Officer Craig confirms the pool was situated directly under the landing to Ms. Emmons' apartment and was thus "very close" to where the officers were standing next to Ms. Emmons' apartment. ER236.

anyone in the apartment was armed or dangerous. ER239-ER240. The officers heard no screaming or fighting coming from within the apartment; they did not observe anyone running into or out of the apartment; they did not see any indication that someone was injured; and they did not locate or encounter any neighbor that could confirm that any screaming or altercation had occurred as reported by the 911 caller. ER241-ER242, ER142, ER149-ER150.

When the officers knocked on the apartment door, Ms. Douglas asked the officers why they were there. ER089-ER090. Ironically, the officers responded that the matter did not concern her, to which Ms. Douglas replied, "Well, that's my apartment. What's going on?" ER090, ER246. The officers responded they were doing a welfare check, to which Douglas responded, "Well, everyone is fine. I'm here. My name is Ametria Douglas. I live there. You can leave. There's no reason for you to be here anymore. You can see I'm fine, and I'm with the boys. Everything is fine." ER090. Despite Ms. Douglas making these statements within a minute or two of the officers arriving, the officers insisted they needed to get into the apartment. ER090, ER094, ER101.

Officer Craig confirms Ms. Douglas attempted to communicate with him and Officer Houchin as they were approaching Ms. Emmons' door. ER242-ER243. While Officer Craig acknowledges it appeared Ms. Douglas and the children in the pool were "connected to the apartment," neither he nor Officer Houchin attempted to confirm Ms. Douglas' identity. ER244-

ER245, ER303. Though, after hearing that she lived in the apartment, Officer Craig began demanding that Ms. Douglas leave the pool to unlock the apartment. ER247.

Upon seeing Officer Craig through the peephole in her front door, Ms. Emmons became scared and did not want to answer the door "[b]ecause of the aggression of how the way that they were knocking on the door" and because of a previous incident when her husband was arrested against her wishes by officers from the same department.[3] ER064-ER067.

Ms. Emmons instructed her father not to answer the door, then went to a nearby window. ER066. Ms. Emmons pushed aside the blinds and stood in front of the open window to talk to Officer Houchin. ER068.

The officers began demanding that Ms. Emmons open the door to the apartment or they would kick the door down. ER277. Ms. Emmons did not understand why the police were "trying to barge in the house like that." ER058. "It was scary." ER058.

The officers did not tell Ms. Emmons they were there because Ms. Douglas' mother had called 911; the officers instead kept asking Ms. Emmons where her husband was, to which Ms. Emmons responded that her husband was working in Rhode Island. ER059, ER062-ER063, ER068-ER069, ER278. Ms. Douglas

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[3] Although arrested, no charges were ever filed against Ms. Emmons' husband. ER290.

confirmed Ms. Emmons' husband was not home. ER278.

Ms. Emmons could only guess the police were there because someone had reported her children screamed after she told them they could not go down to the pool and that she would spank them. ER061, ER067, ER281.

Even though police were dispatched with information about a verbal altercation involving Ms. Douglas and her *female* roommate, the officers continued to demand that Ms. Emmons' husband exit the apartment or the officers would break down the door. ER112.

While at the window, Ms. Emmons repeatedly asserted she did not want the officers in her home without a warrant. ER069, ER278, ER280. In response, Officer Craig continued to withhold the specific reason for their presence (i.e., the 911 call from Ms. Douglas' mother), repeating that if Ms. Emmons did not open the door, the officers would knock it down. ER069, ER281-ER283.

Apparently unconcerned with confirming whether an emergency was actually at hand, Officer Craig testified he "just wanted to have [Ms. Emmons] let [him] in." ER250. Officer Craig does not recall, for example, asking Ms. Emmons her name, if everything was ok, or for any other information to corroborate the 911 call before demanding entry. ER250-ER251.

It was not until well into the incident that Officer Houchin finally told Ms. Douglas the officers were there because of a 911 call from "somebody's mom up in L.A." ER303. Even then, Officer Houchin did not ask Ms. Douglas to confirm her identity. ER143-ER146. Officer Houchin claims, confusingly, that before he could confirm Ms. Douglas' identity, he needed to get into Maggie Emmons' apartment. ER146.

Several minutes into the incident, Mr. Emmons approached the window through which his daughter was talking with Officer Craig. ER114. While there, Mr. Emmons was identified as Maggie Emmons' father. ER115, ER283. Mr. Emmons and his daughter then stepped away from the window to talk about whether Ms. Emmons should open the door for the officers. ER118-ER121. It was at this point that Officer Craig made it clear he did not view Mr. Emmons as a threat, stating Mr. Emmons was "trying to talk sense to her in there." ER283, ER302.

Around this time, Petitioner Sergeant Toth was called to the scene. ER163. When he arrived, Officers Craig and Houchin still had not discovered any evidence to corroborate the 911 report that Ms. Douglas had screamed for help. ER178-ER180. And while Sergeant Toth thought there was "potential" for an emergency situation to exist, he was not aware of any ongoing emergency in the apartment. ER181-ER183.

B. The Police Do Not Perceive Ongoing Emergency

The incident was classified only "priority 2," i.e., not the highest dispatch priority. ER229-ER230. In responding to the initial call to Ms. Emmons' apartment, for example, Officer Houchin did not drive with lights and siren, because he did not believe that the call warranted such a response. ER135-136.

Like Officer Houchin, Officer Craig drove "normally" to Ms. Emmons' residence, neither speeding to the scene nor using lights and siren. ER234-ER235.

Another officer not a party to this proceeding, Officer Joseph Leffingwell, testified he did not think the incident "elevated to the level that required immediate force to make entry" and that, when he told Ms. Emmons to open her door, he was asking for consent. ER208-ER209.

The lapse in time is significant, as well, to the lack of an ongoing emergency. Officer Houchin confirmed that, once officers arrived, they had time to call for backup and a supervisor, wait for their arrival, then formulate a plan before attempting to enter Ms. Emmons' apartment. ER151. Officers Craig and Houchin were "very calm" as they waited for additional officers. ER249.

Sergeant Toth confirmed that, if there had been an imminent threat before he or another supervisor

arrived, the responding officers could have forced entry. ER168-ER169.

C. The Police Unlawfully Arrest Mr. Emmons, Using Excessive Force

When Sergeant Toth arrived, he says he was met by Officer Houchin who began filling him in on the situation.[4] Officer Houchin was interrupted, however, when Mr. Emmons exited the apartment. ER165-ER167, ER172-ER173, ER133.

Trying to balance his daughter's fear of the police with the officers' repeated threats to break down the door, Mr. Emmons eventually decided he should go outside to talk with the officers. ER113.

As he exited and closed the apartment door, Mr. Emmons did not hear any clear command to leave open the door. ER116, ER122, ER124. In fact, when Mr. Emmons exited, no officer was immediately visible, as Officers Craig and Houchin were near the window. ER123.

Further, as Mr. Emmons closed the door, he was facing the door. ER124. Thus, Mr. Emmons first realized an officer was near the door when he was grabbed and forced to the ground. ER124. Thus, it

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[4] Officer Houchin admits he turned his body camera off for this discussion with Sergeant Toth, and (unsurprisingly) claims it was during this unrecorded period that he told Sergeant Toth there had been a prior incident of domestic violence at Ms. Emmons' apartment. ER133-ER134.

cannot be said Mr. Emmons closed the door after hearing a clear and lawful police order. ER117, ER125,

Ms. Douglas remembers Mr. Emmons' arrest as him being "yanked out," then being "on the ground in handcuffs." ER091. Ms. Douglas observed no aggressive behavior by Mr. Emmons. ER091-ER092. She never saw Mr. Emmons slam the door on the officers. ER094. Ms. Douglas saw Mr. Emmons "being tackled to the ground." ER100-ER101.

Officer Craig never directly commanded Mr. Emmons to open the door to Ms. Emmons' apartment. ER252-ER253. And according to Officer Craig, Mr. Emmons' exiting and closing of the door could be considered, at most, only passive resistance. ER254-ER255.

Upon seeing Mr. Emmons' arrest, his grandsons began yelling up from the pool: "Let my granddaddy go! . . . What are you doing to my granddaddy?!" ER093, ER285. Both crying, the boys left the pool and tried to go up to the apartment to help their grandfather. ER093.

In addition to helping Officer Craig press Mr. Emmons to the ground, Sergeant Toth gave his stamp of approval to Mr. Emmons' continued unlawful arrest and false charge of violating California Penal Code section 148. ER184.

II. Proceedings

Mr. Emmons does not take issue with Petitioners' recitation of this case's procedural history; he notes only a few facts for clarification or emphasis.

A. Southern District of California

The district court concluded "genuine issues of material fact preclude summary judgment on whether Officer Craig used a reasonable amount of force under the circumstances." (App. 30.)

B. Ninth Circuit

Petitioners argue the Ninth Circuit "correctly affirmed the District Court's judgment as to Maggie Emmons' Fourth Amendment claims finding that the 'officers had an objectively reasonable basis to conclude that there was a need to conduct a welfare check inside the apartment.'" (Pet'n 20.) Though, if the Court grants the Petition, the Ninth Circuit's decision as to Maggie Emmons' unreasonable-search claim will also have to be reviewed.

Petitioners' justification for arresting and using force on Mr. Emmons rests on their claim that an ongoing "emergency" required their entry into Maggie Emmons' apartment, and that Mr. Emmons impeded this mission.

As set forth in the preceding section, however, by the time Mr. Emmons was forced to the ground and arrested, the officers had seen the individual they were sent to check on (namely, Ms. Douglas) playing with Maggie Emmons' two children in a pool, located just under the subject apartment. Ms. Douglas had identified herself as an occupant of the apartment, saying there was no need for assistance.

Maggie Emmons had already talked to the officers through an open window, repeatedly explaining she did not want the officers in her apartment without a warrant because she had recently had a scary experience with officers from the same department. There was no indication Ms. Emmons' husband was anywhere nearby.

By the time Mr. Emmons was forced to the ground and arrested—nearly ten minutes into the incident—the officers had no evidence corroborating the 911 report of an adult woman screaming for help. In fact, by the time Mr. Emmons exited the apartment, the officers still had not explained the exact reason for their presence.

By the time Mr. Emmons exited the apartment, even Officer Craig had acknowledged Mr. Emmons was "trying to talk sense" to his daughter, who was continuing to insist on a warrant.

To the extent Petitioners claim the Ninth Circuit's decision on Mr. Emmons' Fourth Amendment claim is subject to review, so too is the

question of whether disputes of material fact exist as to whether the officers reasonably believed an ongoing emergency was at hand, such that the emergency/welfare exception to the warrant requirement applied.

REASONS TO DENY WRIT

"A petition for a writ of certiorari will be granted only for compelling reasons." S. Ct. R. 10.

Considerations in deciding whether to grant a writ include: (1) whether a "court of appeals has entered a decision in conflict with the decision of another . . . court of appeals," and (2) whether a "court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(a) & (c).

The Ninth Circuit's holding that Sergeant Toth and Officer Craig are not entitled to qualified immunity at the summary judgment stage does not conflict with the decision of another circuit court or with relevant decisions of this Court.

There are no compelling reasons to grant the Petition. The Petition should be denied. And the Court should not, as Petitioners suggest, summarily reverse the Ninth Circuit's decision as to Mr. Emmons' Fourth Amendment claim against Sergeant Toth and Officer Craig.

I. The Ninth Circuit Applied the Correct, Though Amorphous, Legal Standard in Denying Qualified Immunity at Summary Judgment

While the Ninth Circuit's Amended Memorandum does not set forth a complete exposition of qualified-immunity jurisprudence, it squarely addresses the issue. (App. 4.) The court states, "The right to be free of excessive force was clearly established at the time of the events in question. *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013)." (App. 4.) And without repeating it here, the Ninth Circuit in *Gravelet-Blondin* correctly explained the qualified-immunity standard in detail. *See id.* at 1092-95.

That said, Mr. Emmons' agrees with the Cato Institute's recent assessment of this judge-made doctrine. (Cato Inst. Amicus Br., *Almighty Supreme Born Allah v. Milling*, S. Ct. No. 17-8654, filed May 25, 2018.) Mr. Emmons agrees that—despite this Court issuing more than thirty opinions clarifying the application of this doctrine since its inception in the 1980s—the doctrine remains "amorphous" and "unmoored from any lawful justification and in need of correction." (*Id.* at 2-3, 7.)

Mr. Emmons further agrees with the Cato Institute that the question of whether a right is "clearly established" is "nebulous," having become "exactly what the Court assiduously sought to avoid—

a 'freewheeling policy choice.'" (*Id.* at 20.) Application of this one standard, has resulted in drastically different outcomes from circuit to circuit. (*See id.* at 7-11.)

Even Petitioners acknowledge application of the "clearly established" prong may depend on the selection of, "unfortunately, Circuit panels." (Pet'n 29-30.)

In front of this backdrop, it cannot be said the Ninth Circuit misstated or misapplied this Court's qualified-immunity jurisprudence when, assuming all disputes of fact were resolved in Mr. Emmons' favor, it found Mr. Emmons' right to be free from excessive force was "clearly established" under the circumstances of this case.

Because Petitioners contend, at most, that the Ninth Circuit misapplied the doctrine of qualified immunity, the Petition should be denied. *See* S. Ct. R. 10 ("A petition . . . is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

II. All But the Plainly Incompetent or Those Who Knowingly Violate the Law Would Have Known the Arrest of, and Use of Force on, Mr. Emmons Violated His Fourth Amendment Right to Be Free From Excessive Force

In *Gravelet-Blondin*, the court explained that, in the Ninth Circuit, "the right to be free from the application of non-trivial force for engaging in passive resistance was clearly established *prior to 2008*." 728 F.3d at 1092-95 (emphasis added). In support of its explanation, the Ninth Circuit cited numerous cases establishing the distinct "contours" of this right, including *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012).

In *Nelson*, the Ninth Circuit, again citing numerous cases establishing the contours of this right, explained "that a failure to fully or immediately comply with an officer's orders neither rises to the level of active resistance nor justifies the application of a non-trivial amount of force." 685 F.3d at 881-82.

Thus, contrary to Petitioners' misleading argument that the Ninth Circuit relied on a *single* case, "decided after the event" (Pet'n 32-33), the Ninth Circuit, in fact, relied on numerous cases to support its conclusion that Mr. Emmons' right to be free from excessive force was "clearly established" as early as 2008—five years before this incident in 2013.

Of course, whether Mr. Emmons actively resisted the officers, and whether the officers used more than a non-trivial amount of force on Mr. Emmons, are among the material facts that remain in dispute.

If the Ninth Circuit intended to rely solely on *Gravelet-Blondin* (as opposed to the many cases cited therein), this would not be plain error, as this Court has repeatedly emphasized that satisfaction of the "clearly established" prong "does not require a case directly on point for a right to be clearly established," and that "general statements of the law are not inherently incapable of giving fair and clear warning." *White v. Pauly*, 137 S. Ct. 548, 551-52 (2017).

Given extensive body of Ninth Circuit law delineating the right to be free from non-trivial force in response to passive resistance, "all but the plainly incompetent or those who knowingly violate the law," *see Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015), would have known, at the time of this incident, that it would violate the Fourth Amendment to force an elderly man to the ground, and hold him there for minutes, thereby injuring his back and hip, after acknowledging this man had been trying to bring order to the incident (by "talking sense to" his daughter, as described by Officer Craig).

III. A Writ of Certiorari is Not Required to Resolve the Issue of Probable Cause

Mr. Emmons agrees with Petitioner that the Ninth Circuit did not decide whether disputes of material fact preclude summary judgment in the officers' favor on Mr. Emmons' claim that officers did not have probable cause to arrest him for violating California Penal Code section 148(a)(1) (interfering with or obstructing an officers' lawful duties). (*See* Pet'n 34.)

The Ninth Circuit did, however, find: "There is evidence from which a reasonable trier of fact could find that Mr. Emmons was unarmed *and non-hostile*." (App. 3-4 (emphasis added).) One could infer the Ninth Circuit intended this holding to include the issue of probable cause; that is, that disputes of fact precluded summary judgment on the issue of probable cause, as well.

Indeed, as set forth in Mr. Emmons' Statement of the Case, there is evidence showing Mr. Emmons could not have possibly interfered with or obstructed any lawful police conduct. Mr. Emmons remembers, for example, having already closed the apartment door before hearing any command to leave the door open. And whether the command to leave the door open was lawful, of course, raises the question of whether the officers reasonably perceived an ongoing emergency when Mr. Emmons was commanded to leave the door open.

Regardless, whether the Ninth Circuit failed to rule on the issue of probable cause is not grounds for granting a petition for writ of certiorari. *See* S. Ct. R. 10.

The Court may, of course, issue an order pursuant to Supreme Court Rule 24.1(a), instructing the Ninth Circuit to rule on the issue of probable cause. Though, given the disputes of material fact underlying Mr. Emmons' unlawful-arrest claim, Mr. Emmons would request any such order direct the Ninth Circuit to enter a ruling stating that disputes of material fact preclude summary judgment on Mr. Emmons' unlawful-arrest claim.

CONCLUSION

The Ninth Circuit did not err in applying the relatively young, amorphous doctrine of qualified immunity in this case. The Court should deny the Petition.

Respectfully submitted,

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